

**REDACTED DECISION -- 06-351 MFE -- BY ROBERT W. KIEFER, JR., ALJ --
SUBMITTED for DECISION on OCTOBER 12, 2007 -- ISSUED on MARCH 7, 2008**

SYNOPSIS

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment respecting a civil penalty assessment issued pursuant to W. Va. Code § 11-14C-1, *et seq.*, the burden of proof is upon the Petitioner to show that the civil penalty assessment against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- FAILURE TO OBTAIN A LICENSE OR SUBSEQUENTLY RETAIN A LICENSE -- West Virginia Code § 11-14C-38 [2003] makes any person who engages in any business activity for which a license is required by Article 14C, without having first obtained and subsequently retained such a valid license, subject to a civil penalty in the amount of \$5,000.00 for a first violation, and \$10,000.00 for the second and all subsequent violations.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- W. VA. CODE § 11-14C-38 [2003] CLEAR AND UNAMBIGUOUS -- The language of W. Va. Code § 11-14C-38 [2003] is clear and unambiguous, and does not require willfulness, or any other evidence respecting a person's mental state, as a predicate for imposition of the civil penalty provided by that section.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- INCORPORATION OF W. VA. CODE §§ 11-10-18 & 19, AS AMENDED, INTO CHAPTER 11, ARTICLE 14C -- West Virginia Code § 11-14C-33(a) & -(b) [2003] provide that each and every provision of Chapter 11, Articles 9 & 10 applies to the taxes levied by Article 14C, except as otherwise expressly provided in Article 14C, with like effect as if Articles 9 & 10 were applicable only to the taxes levied by Article 14C and were set forth *in extenso* in said article.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- CONFLICT BETWEEN ARTICLE 14C AND ARTICLE 10 -- West Virginia Code § 11-14C-33(c) [2003] provides that where there is some conflict between any provision of Article 14C and any provision of Article 10, the provision of Article 14C shall control.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- WEST VIRGINIA OFFICE OF TAX APPEALS' AUTHORITY TO ABATE ASSESSMENT -- In reviewing a civil penalty assessment issued by the State Tax Commissioner pursuant to the provisions of W. Va. Code § 11-14C-38 [2003], the West Virginia Office of Tax Appeals is limited to determining whether or not the taxpayer engaged in the predicate act that gives rise to the civil penalty, and may abate an assessment issued by the State Tax Commissioner only when it is proven that the taxpayer did not engage in the predicate act authorizing imposition of the civil penalty giving rise to the assessment.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- W. VA. CODE § 11-14C-38 [2003] NOT TO BE CONSTRUED *IN PARI MATERIA* WITH W. VA. CODE §§ 11-10-18 & 19, AS AMENDED -- The language of W. Va. Code § 11-14C-38 [2003], being without doubt or ambiguity, is not to be “construed” *in pari materia* with the provisions of Chapter 11, Article 10 of the Code.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- TAX COMMISSIONER’S AUTHORITY TO ISSUE CIVIL PENALTY ASSESSMENT -- The overarching scheme of Chapter 11, Article 14C, permits the State Tax Commissioner to issue a civil penalty assessment for violations of the applicable statutory provisions set forth therein.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- KNOWLEDGE OR INTENT NOT REQUIRED -- A person who violates W. Va. Code § 11-14C-38 [2003] may be assessed a civil penalty for the violation, even when the violation is without knowledge of the statute or intent to violate the same.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- CIVIL PENALTY NEITHER WORKS A FORFEITURE NOR SHOCKS THE CONSCIENCE -- W. Va. Code § 11-14C-38 [2003] does not violate the Petitioner’s right to procedural due process, because the amount of the penalty set forth therein neither works a forfeiture nor shocks the conscience.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- ASSESSMENTS FOR MULTIPLE VIOLATIONS -- A person subject to W. Va. Code, Chapter 11, Article 14C, may be assessed multiple civil penalties for multiple statutory violations even though it is not given notice of the statutory violation by means of an assessment issued after the first violation.

MOTOR FUEL EXCISE TAX -- CIVIL PENALTY -- FAILURE TO MEET BURDEN OF PROOF -- The Petitioner in this matter has failed to carry its burden of proving that the civil penalty assessment against it is erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On April 25, 2006, a Tax Unit Supervisor issued a motor fuel excise tax civil penalty assessment against the Petitioner. The assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 14C of the West Virginia Code. The assessment was a civil penalty assessment for three purported violations of the motor fuel excise tax statute. The first violation, for which the Petitioner was assessed a \$_____ penalty, allegedly occurred on October 5, 2005. The second violation, for which the

Petitioner was assessed a \$_____ penalty, allegedly occurred on November 8, 2005. The third violation, for which the Petitioner was also assessed a \$_____ penalty, allegedly occurred on December 7, 2005. The assessment was in the total amount of \$_____. Written notice of this assessment was served on the Petitioner on April 26, 2006.

Thereafter, by mail postmarked June 7, 2006, received in the offices of the West Virginia Office of Tax Appeals on June 9, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(1) [2002] & 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. Mr. A is the owner and President of the Petitioner.
2. Ms. B is the Vice-President of the Petitioner.
3. The Petitioner is in the business of transporting fuel.
4. The Petitioner has been in business since 2000.
5. Approximately forty per cent (40%) of the fuel that the Petitioner transports is aviation fuel. The remaining sixty per cent (60%) consists of gasoline, diesel fuel, ethanol and the like.
6. The Petitioner does not own any of the petroleum products that it transports.
7. The Petitioner owns eighteen trucks.
8. Mr. A operates the fleet and oversees the drivers and other details respecting the physical operations of the business.
9. Ms. B takes care of the inside operations, primarily paperwork.
10. One of Ms. B's duties is to ensure compliance with state and federal laws and regulations respecting reporting.

11. Approximately eighty per cent (80%) of the Petitioner's business is conducted in the Commonwealth of Virginia. Most of the remaining twenty per cent (20%) of the Petitioner's business is conducted in three (3) states outside of West Virginia.

12. The Petitioner has no regular routes in West Virginia.

13. The only business that the Petitioner has ever conducted in West Virginia consisted of delivering aviation fuel to the State.

14. The only time that the Petitioner has had cause to deliver products to West Virginia since the enactment of Chapter 11, Article 14C of the West Virginia Code was in late 2005, when requested to do so by Company A.

15. Other deliveries made into the State of West Virginia were prior to the effective date of the current motor fuel excise tax statute, and are not subject to assessment under the current statute.

16. The Petitioner has hauled AVGAS, a low-lead gasoline fuel used in small "piston-type" airplanes, and aviation jet fuel, used in larger jets.

17. In those instances when it delivered petroleum products to West Virginia, it delivered them to two (2) airports in West Virginia.

18. In each instance, Company A requested that the product be delivered to the customer either on the day the request was made, or the next day.

19. As indicated by the first page of Petitioner's Exhibit No. 1, on or about October 5, 2005, the Petitioner shipped 8500 gallons of "AVGAS 100LL" from an out-of-state terminal, to a West Virginia airport.

20. "AVGAS" is aviation fuel, with the designation "LL" indicating that it is low-lead fuel.

21. AVGAS cannot be transported via pipeline. It must be shipped by railcar or by barge. Consequently, AVGAS is carried by only a few terminals. The terminal at which the Petitioner loaded the AVGAS is the only terminal in the Commonwealth of Virginia that supplies AVGAS.

22. In his testimony, Mr. A opined that, based on the time that the fuel was loaded onto the truck at the terminal, the order for that fuel had been called in that morning, as opposed to the prior day.

23. The bill of lading states that Company B is responsible for all taxes on the AVGAS.

24. With respect to the AVGAS delivered on October 5, 2005, the Petitioner had no responsibility for reporting or paying tax to the State of West Virginia.

25. On the first page of Petitioner's Exhibit No. 1, the Loading Manifest, the third handwritten line is the signature of the employee of a West Virginia Airport, who was present at the time that the fuel was delivered.

26. As indicated by the second page of Petitioner's Exhibit No. 1, on or about December 7, 2005, the Petitioner shipped 5000 gallons of "AVGAS 100LL" from the same terminal to another airport in West Virginia.

27. This load of AVGAS was loaded at approximately 7:49 a.m., indicating that the order for the fuel had been placed the prior day.

28. As shown on the second page of Petitioner's Exhibit No. 1, at the time that the fuel was delivered to a West Virginia airport, it was signed for by one Mr. C.

29. As shown on the third page of Petitioner's Exhibit No. 1, on or about November 8, 2005, the Petitioner shipped 8001 gallons of Turbine Aviation Fuel (jet fuel) to a West Virginia airport.

30. The supplier of the jet fuel was Shell Oil Products.

31. The jet fuel was loaded at approximately 9:10 a.m., indicating that the order for the fuel was placed earlier that same morning.

32. The Petitioner subsequently learned that the cost of a motor fuel transporter's license issued by the State of West Virginia is \$_____, an amount which is not so significant that the Petitioner would refuse to pay the same. According to Ms. B, it would be routine to incur an expense of this type and this amount.

33. Mr. A was not aware of the requirement that the Petitioner possess a motor fuel transporter's license at the time that any of the three loads of fuel were loaded or transported.

34. Ms. B testified that she had no knowledge that petroleum transporters are required to be licensed by the State of West Virginia at the time that the Petitioner hauled each load of fuel into the State of West Virginia.

35. Subsequent to January 1, 2006, Mr. A first became aware that the State of West Virginia required a motor fuel transporter's license, when notified by Ms. B that she was attempting to obtain the same.

36. The Petitioner was not aware of said requirement as the result of magazine articles, notices, mailers or other communications from trade organizations of which it is a member.

37. Ms. B testified that upon learning that the Petitioner was required to possess a West Virginia motor fuel transporter's license, she immediately undertook to obtain said license.

38. Ms. B obtained knowledge of these requirements by seeking out information by means of the Internet and by phone calls to the State Tax "Department," seeking to comply with the laws of the State of West Virginia.

39. It is the testimony of Mr. A that the Petitioner never willfully or intentionally avoided obtaining a West Virginia motor fuel transporter's license, but that it was simply unaware of such requirement at the time that it delivered the fuel.

40. The Petitioner was first aware that it was being assessed for its failure to possess a West Virginia motor fuel transporter's license when it received the assessment, which was issued on or about April 25, 2006.

41. Prior to the assessment, the Petitioner never received any notification, inquiry or warning that the State Tax Commissioner believed that the Petitioner had violated the law in connection with any of these transactions.

42. The Petitioner concedes that it did not possess a West Virginia motor fuel transporter's license on the dates of the deliveries, but that its failure to possess such a license was inadvertent, resulting from lack of knowledge of the law, rather than an intentional disregard of the law.

43. Mr. A does not know where the two (2) airports in West Virginia normally obtain their AVGAS and jet fuel.

44. A "will call" customer is a customer with whom the Petitioner does not have an ongoing responsibility to provide fuel. The customer calls and advises the Petitioner of what product they need and how much.

45. When Ms. B learns that a "will call" customer has requested the Petitioner to transport or deliver fuel in or to a specific jurisdiction, she goes to the Internet and searches websites of chambers of commerce, departments of motor vehicles and other entities to attempt to learn the specific reporting requirements for that jurisdiction, and ensure compliance with the same.

46. The Petitioner's regular route customers are located in the Commonwealth of Virginia.

47. It is only "will call" customers that cause the Petitioner to deliver fuel outside of the Commonwealth of Virginia.

48. The Petitioner has "will call" customers in three (3) additional states.

49. Upon being contacted by Company A respecting the delivery of fuel into West Virginia, Ms. B searched the internet to determine the Petitioner's duties to the State. Ultimately this led

to a phone call to the State Tax “Department,” whereupon she spoke to the Fuel Tax Administration Unit Supervisor.

50. Ms B advised the Unit Supervisor that the Petitioner had delivered fuel to customers in West Virginia. She told the Unit Supervisor that she filed monthly reports with other states and wanted to make sure that she was complying with West Virginia law and reporting requirements.

51. The Unit Supervisor told Ms. B that she would send out a packet with the necessary documents, which the Unit Supervisor did.

52. As a result of her conversation with the Unit Supervisor, the Petitioner was sent a “West Virginia Motor Fuel Excise Tax License Application.” Ms. B testified that her phone call occurred and the application was sent after the deliveries were made.

53. By letter dated January 18, 2006, the Unit Supervisor sent a letter to the Petitioner wherein she informed the Petitioner that it was required to obtain a “West Virginia Motor Fuels Tax License,” and described the consequences for failure to do so. *See* State’s Exhibit No. 2, pp. 4-5.

54. Ms. B testified that at the time of the January 18, 2006 letter, she was already in the process of determining the Petitioner’s responsibilities to the State of West Virginia, and who with the State of West Virginia could advise her respecting the Petitioner’s responsibilities.

55. Ms. B testified that she was having some difficulty obtaining responses from the State of West Virginia because some of its employees were on vacation and she was exchanging voice mails with others.

56. Some time prior to February 22, 2006, the Petitioner forwarded its “West Virginia Motor Fuel Excise Tax License Application,” which it apparently believed it had completed.

57. Ms. B recalls that she forwarded the application to the State Tax “Department” some time in December.

58. The application forwarded to the “State Tax Department” was neither dated nor signed.

59. On or about February 22, 2006, under cover an unsigned form letter, the State Tax “Department” returned the application to the Petitioner, advising it that certain information was omitted from the application, specifically an agent for service of process and a five-digit control number issued by the West Virginia Secretary of State. *See* Petitioner’s Exhibit No. 2.

60. Ms. B testified that she needed some advice from employees of the State Tax “Department” because she had never had an application such as this one before.

61. On or about April 25, 2006, the Petitioner was assessed civil penalties for three separate violations of W. Va. Code § 11-14C-38, totaling \$_____, as more fully set forth above.

62. By letter dated April 25, 2006, accompanying the assessment, the State Tax Commissioner, by the Unit Supervisor, notified the Petitioner that it was in violation of West Virginia statutes prohibiting engaging in certain business activities for which a license is required pursuant to the provisions of Chapter 11, Article 14C of the West Virginia Code, citing relevant provisions of the Code.

63. On or about April 28, 2006, in response to the assessment, the Petitioner requested a “waiver” of the assessment because it believed that it had taken all of the steps necessary to obtain a license from the State of West Virginia, and needed time to follow up on the information it had received.

64. By letter dated May 1, 2006, the Petitioner was notified by the Secretary of State of West Virginia that in order to receive a Certificate of Authority to do business in the State of West Virginia, it would be necessary for the Petitioner to provide a Certificate of Good Standing from the requisite authority in the Commonwealth of Virginia, to pay a fee in the amount of \$_____ and to answer certain questions on the application to the Secretary of State, which the Petitioner had previously neglected to answer.

65. On May 4, 2006, the Petitioner paid the necessary fee to the Secretary of State of West Virginia. By facsimile transmission on May 8, 2006, the Petitioner received from the Secretary of State of West Virginia a receipt dated that same day acknowledging the \$_____ payment.

66. An exchange of e-mails occurred on May 23 & 24, 2006, between Ms. B and a State Tax “Department” employee. The State Tax “Department” employee advised Ms. B that the Petitioner still needed a control number assigned to it by the Secretary of State. Ms. B responded that the Secretary of State’s Office had not yet processed the Petitioner’s application and that it was waiting for a “Certificate of Fact” from the Commonwealth of Virginia. The State Tax Department” employee then advised Ms. B that she would continue to check the Secretary of State’s website for the control number and process the license as soon as the control number was assigned.

67. On May 25, 2006, a Clerk of the Virginia State Corporation Commission, issued a certificate stating that the Petitioner had been issued a certificate of organization and, as of that date, no articles of cancellation had been filed with the Commission.

68. On June 7, 2006, Ms. B testified that she called the West Virginia Secretary of State’s Office in an attempt to determine what control number had been assigned to it. She spoke to an employee who apologized and told Ms. B that they only had one person opening mail and that she was the only person in the office who is processing these types of applications.¹

69. Ms. B testified that it took nearly to June to obtain the five-digit control number from the West Virginia Secretary of State.

70. Effective June 12, 2006, the Petitioner received a Motor Fuel Excise Tax License as a Motor Fuel Transporter from the West Virginia State Tax “Department.” See Petitioner’s Exhibit No. 3, p. 1.

¹ The employee to whom Ms. B spoke might be the signatory of the letter of May 1, 2006.

71. The Petitioner also received a Business Registration Certificate for the period beginning July 1, 2005, and ending June 30, 2007. See Petitioner's Exhibit No. 3, p. 8.

72. By letter dated May 24, 2006, Company C, one of Petitioner's "will call" customers, issued a letter to all of its carriers, including Petitioner, informing them that the State of West Virginia required an Import Verification Number on all fuel imported into West Virginia.

73. Ms. B testified that with the exception of correspondence with the State Tax "Department" and Secretary of State's Office, the May 24, 2006 letter from Company C was the first notification the Petitioner received that an import verification number was required by the State of West Virginia.

74. Ms. B considered the timing of this letter to be a coincidence.

75. Ms. B testified that no employee of the Petitioner ever intentionally tried to avoid compliance with the provisions of the West Virginia motor fuel excise tax.

76. Ms. B testified that during 2005 no person associated with the Petitioner ever negligently, willfully or intentionally ignored any notice given by a third-party designed to inform the Petitioner of the necessity of obtaining the license required by of the West Virginia motor fuel excise tax.

77. Subsequent to the effective date of W. Va. Code § 11-14C-1, *et seq.*, and prior to October, 2005, the Petitioner had no business contacts with the State of West Virginia.

78. Subsequent to the effective date of W. Va. Code § 11-14C-1, *et seq.*, and prior to October, 2005, the Petitioner was not doing business in the State of West Virginia.

79. Ms. B testified that her first verbal contact with an employee of the State Tax "Department" was with the Unit Supervisor.

80. Ms. B testified that when the Petitioner obtained its license from the State of Virginia, it is required to list the jurisdictions in which it will operate. She further testified that it can be

difficult to predict all of the jurisdictions in which it will operate when it has “will call” customers, who may ask it to transport fuel into jurisdictions where it has not operated before and in which it did not predict it would operate.

81. Prior to October, 2005, neither Mr. A nor Mss. B knew that the Petitioner would be operating as it did in the State of West Virginia.

82. Mr. A testified that in the past she has disclosed jurisdictions in which the Petitioner has a history of operating.

83. Ms. B testified that the Petitioner is the back up for Company A’s usual transporter. The Petitioner may transport fuel for Company A if there is a fuel shortage at the terminal where its usual transporter picks up fuel, if the usual transporter’s trucks are out of commission, or if its drivers cannot drive due to illness or safety reasons, such as having already driven too many hours in a specified period of time.

84. Ms. B is not sure exactly when she contacted the Unite Supervisor of the State Tax “Department,” but she “feel[s] confident” that the contact occurred “after the first, in between the second and the third, somewhere around in there.” She knew that the Petitioner needed to comply with the laws of the State of West Virginia.

85. If Mr. A or Ms. B anticipates that the Petitioner may need to make a delivery to a jurisdiction in which it is not authorized to make deliveries, Ms. B will go to the Virginia Department of Motor Vehicles and add the anticipated jurisdiction to the cab cards of one or more of the Petitioner’s trucks.

86. Ms. B testified that after what the Petitioner has been through, it might refuse to deliver fuel on a will call basis to jurisdictions where it is not already registered to do business. Ms. B testified that she and her husband will weigh the cost of registering in each jurisdiction to determine whether or not they will, in fact, register with a particular jurisdiction.

87. Ms. B testified that the Petitioner is not required to have a special motor fuel transporter's license in three (3) of the states.

88. Mr. A testified that there must be monthly reporting of gallons to the various states in which they do business. That was her reason for calling the State of West Virginia. This requirement is another check by which the various governments attempt to track the amount of fuel bought, transported, sold and consumed.

DISCUSSION

The Petitioner in this matter contends that it should not be subject to the assessment of the \$_____ civil penalty. It contends that it did not act willfully. The evidence shows that the Petitioner did not act with a willful disregard for the law. According to the Petitioner, because it did not act willfully the civil penalty assessment against it should be abated.

Before discussing the application of the law to the facts in this matter, this Office will address the issue of the evidence respecting the time that the Petitioner first contacted the State Tax "Department" respecting obtaining a license. There is a conflict in the evidence respecting this issue.

Ms. B testified that she contacted the State Tax "Department" soon after the Petitioner made its first delivery of fuel into West Virginia. Presumably that would have been in October, 2005. There is a possible contradiction in her testimony, wherein she stated that she was unaware of the need for a license at the time that the fuel was delivered. This is consistent with other testimony, that she first contacted the State Tax "Department" after all deliveries had been made, the last of which was in December, 2005. That she contacted the State Tax "Department" at this later date is consistent with other evidence.

Ms. B testified that when she contacted the State Tax "Department," the person she spoke with said that they would send a packet with an application. This packet was sent under cover

letter of January 18, 2006. *See* State's Exhibit No. 2. It seems unlikely that the State Tax "Department" would receive the call in October, 2005, but delay sending the application packet until January 18, 2006.

Mr. A's testimony also tends to support a finding that the application was not sent to the Petitioner until January. He testified that he learned of the license requirement after the first of the year, some time in January, 2006. Additionally, the application was returned to the Petitioner as incomplete under a cover letter dated February 22, 2006. This tends to support a finding that the application was sent to the Petitioner some time after January 18, 2006, and that the Petitioner filed the application, albeit incomplete, between January 18 and February 22, 2006. This evidence contradicts Ms. B's testimony that she believes she mailed the application in December, 2006.

Ms. B's recollection respecting the dates on which certain events occurred was not concrete. Other less subjective and more reliable evidence tends to contradict her recollection. It appears that Ms. B did not act as early or as promptly as she recalls. Except insofar as she testified that she acted as early as she recalls, it appears that her testimony is credible.

The Petitioner also attempts to justify abatement of the assessment because certain delays in obtaining the license were the results of delays on the part of the State. This is true, in part. Ms. B testified that she was having difficulties obtaining responses from the State because employees were on vacation. However, her testimony does not disclose whom she was attempting to contact, when the delays occurred, or the length thereof. She does point to some delay in the Secretary of State's Office. But this delay did not occur until May or June, 2006. Some delay must have been caused by the Virginia State Corporation Commission, although this point is not clear from the evidence.

It appears that the Petitioner may have been responsible for much of the delay. The Petitioner received the application subsequent to January 18, 2006, filled it out in part, and returned it to the State Tax “Department,” which returned it to the Petitioner on February 22, 2006. It does not appear that the Petitioner reacted to the February 22, 2006 response until late April, 2006, when it received the assessment. There then occurred a flurry of activity, with some delay, that resulted in it being issued a license on June 12, 2006. It should be noted that any delay in obtaining the license had no bearing on the Petitioner’s failure to have a license at the time the fuel was delivered.

The assessment was issued against the Petitioner pursuant to W. Va. Code § 11-14C-38, which provides:

§ 11-14C-38. Engaging in business without a license; civil penalty.

(a) Any person who engages in any business activity for which a license is required by this article without having first obtained and subsequently retained such a valid license is subject to the following civil penalty.

(1) For the first violation the amount is five thousand dollars.

(2) For each subsequent violation the amount is ten thousand dollars.

(b) Civil penalties prescribed under this section shall be assessed, collected and paid in the same manner as the motor fuel tax.

This section permits the Tax Commissioner to assess a civil penalty against a person or entity required to obtain or subsequently retain a license to conduct business under Article 14C, Chapter 11 of the Code, but who has not obtained or retained such a license. The language “is subject to,” instead of the mandatory “shall,” makes it apparent that the State Tax Commissioner is authorized to assess a civil penalty under this section. It also clear that the State Tax Commissioner has discretion to issue an assessment for a civil penalty, but is not required to issue an assessment for each and every violation. In the present action, the State Tax

Commissioner assessed a civil penalty for three separate violations of § 11-14C-38, in a total amount of \$_____.

The Petitioner contends that this Office has the authority to waive or abate the assessment, even though the statute contains no language authorizing a waiver or abatement. The Petitioner points to certain provisions of Article 10, Chapter 11 of the Code, which allow waiver or abatement of additions to tax or penalties when certain predicate standards are not present, such as willful neglect, intent or fraud. It maintains that these standards should also apply to W. Va. Code § 11-14C-38,² citing W. Va. Code § 11-14C-33, which provides:

§ 11-14C-33. General procedure and administration; crimes and penalties.

(a) Each and every provision of the "West Virginia Tax Procedure and Administration Act" set forth in article ten of this chapter applies to the taxes levied by this article, except as otherwise expressly provided in this article, with like effect as if that act were applicable only to the taxes levied by this article and were set forth in extenso in this article.

(b) Each and every provision of the "West Virginia Tax Crimes and Penalties Act" set forth in article nine of this chapter applies to the taxes levied by this article with like effect as if that act were applicable only to the taxes levied by this article and were set forth in extenso in this article.

(c) To the extent that any provision of this article is in conflict with either article nine or article ten of this chapter, the provision of this article shall control.

The Petitioner contends that § 11-14C-38 must be read *in pari materia* with certain provisions of Article 10, specifically §§ 11-10-18 & 11-10-19.³

² They also apply to other sections.

³ The Petitioner's *in pari materia* argument is subject to one of two interpretations. The first is that W. Va. Code §§ 11-10-18 & 11-10-19 expressly apply in determining whether to waive or abate a civil penalty assessment issued pursuant to W. Va. Code § 11-14C-38. The second is that absent some express provision respecting waiver or abatement of an assessment issued pursuant to W. Va. Code § 11-14C-38, W. Va. Code §§ 11-10-18 & 11-10-19 provide guidance respecting the standard that is necessarily implied therein. In fact, there are predicate acts that permit the imposition of additions to tax or penalties expressly set out in W. Va. Code §§ 11-10-18 & 11-10-19. In each instance, the predicate act is materially different than the predicate act permitting the State Tax Commissioner to impose a civil penalty under W. Va. Code § 11-14C-38. Therefore, the Petitioner can hardly argue that the cited provisions of Article 10 expressly apply to an assessment issued pursuant to W. Va. Code § 11-14C-38. The Petitioner's memoranda can only lead this Office to conclude that the Petitioner is advancing the latter argument.

W. Va. Code § 11-10-18 permits the imposition of additions to tax for failure to file tax returns, failure to pay tax due as shown on a tax return, and failure to pay tax required to be shown as due on a return within fifteen (15) days of notice and demand therefor, unless the failure “is due to reasonable cause and not due to willful neglect.” W. Va. Code § 11-10-18(a)(1), (2) & (3). Additions to tax may also be imposed for negligence or for intentional disregard of rules and regulations, without intent to defraud, W. Va. Code § 11-10-18(c); and for filing false and fraudulent returns, W. Va. Code § 11-10-18(d).

W. Va. Code § 11-10-19 permits the imposition of penalties for the willful failure to truthfully account for and pay over tax, or for the willful attempt to evade or defeat any tax, W. Va. Code § 11-10-19(a); for willfully furnishing a false or fraudulent withholding tax statement to an employee, or for failing to furnish a withholding tax statement in the manner or time prescribed, or containing the information prescribed by the applicable statute, W. Va. Code § 11-10-19(b); or for the filing of a false or fraudulent claim for refund or credit with intent to defraud the State, W. Va. Code § 11-10-19(c). Penalties may also be imposed for the engaging in activities promoting abusive tax shelters, as described in certain provisions of the Internal Revenue Code. W. Va. Code § 11-10-18(f).⁴

The Petitioner correctly asserts that these sections require something more than the mere performance of an act or an omission to act. For these sections to apply, a taxpayer must exhibit some mental state, such as willfulness, negligence, intentional disregard, fraud or falsehood, in violating the law. The Petitioner maintains they disclose a legislative intent not to impose additions to tax or penalties in the absence of willfulness, negligence, intentional disregard, fraud or falsehood. It contends that because W. Va. Code § 11-14C-33, in effect, incorporates the Tax

⁴ It is not clear why this provision involving a penalty was placed in the section pertaining to additions to tax, and not in the section pertaining to penalties.

Procedures and Administration Act into the motor fuel excise tax statute, this general incorporation demonstrates legislative intent to specifically incorporate these requirements into § 11-14C-38. The Petitioner maintains that, as demonstrated by the evidence, its actions do not rise to this level. Because its actions do not rise to this level, no civil penalty can be imposed.

The State Tax Commissioner responds by arguing that the statute “for lack of a better term, creates a ‘strict liability’ offense.” Respondent’s Reply Brief, p. 2. According to the Tax Commissioner, any violation of the statute is sufficient to permit him to assess the Petitioner, even an unintentional or unwitting one. Willfulness, negligence, intentional disregard, fraud or falsehood is not required. The Commissioner maintains that the Petitioner is attempting to graft an element onto the statute that is neither required nor permitted.

The plain language of W. Va. Code § 11-14C-38 supports the position advanced by the State Tax Commissioner. The statute is clear on its face. If a person or entity commits the predicate act, engaging in a certain business without obtaining or subsequently retaining the applicable license, then that person or entity is subject to a civil penalty. The act need not be done willfully, negligently, with knowledge, with intentional disregard, fraudulently or falsely. A person may be subject to a civil penalty when it is aware of the statute, but believes it is in compliance. A person may be subject to a civil penalty even when it is unaware of the existence of the statute. Once a person commits the predicate act and is assessed a civil penalty, nothing in the statute permits waiver or abatement of the assessment by this Office.

Other provisions of the motor fuel excise tax statute also permit imposition of civil penalties. W. Va. Code § 11-14C-34(f) imposes a civil penalty for transporting motor fuel in certain identified vehicles without a shipping document or with a false or incomplete shipping document, or for delivering motor fuel to a destination state other than the destination state shown on the shipping document. W. Va. Code § 11-14C-35(b) imposes a civil penalty on an

importer who imports motor fuel into West Virginia without first obtaining an import confirmation number. W. Va. Code § 11-14C-36(a) imposes a civil penalty on any person who:

- (1) sells or stores any dyed diesel fuel for use in a highway vehicle that is licensed or required to be licensed as such, unless that use is allowed under the authority of 26 U.S.C. § 4082;
- (2) willfully alters or attempts to alter the strength or composition of any dye or marker in any dyed diesel fuel;
- (3) uses dyed diesel fuel in a highway vehicle unless that use is allowed under the authority of 26 U.S.C. § 4082;
- (4) acquires, sells or stores any motor fuel for use in a watercraft, aircraft, or highway vehicle that is licensed or required to be licensed unless the tax levied by section five [§ 11-14C-5] of this article has been paid; or
- (5) uses any motor fuel in a watercraft, aircraft, or highway vehicle that is licensed or required to be licensed unless the tax levied by section five [§ 11-14C-5] of this article has been paid.

W. Va. Code § 11-14C-37(a) imposes a civil penalty for failure to allow an inspection or the taking of a fuel sample from a storage tank or container. W. Va. Code § 11-14C-39(a) imposes a civil penalty on any person who intentionally prevents another person from applying for or obtaining a license by use of coercion, threat, intimidation or any other means of interference. W. Va. Code § 11-14C-40(a) imposes a civil penalty on any person who files a false or fraudulent return with intent to evade tax. W. Va. Code § 11-14C-40(b) imposes a civil penalty on any person liable for tax who fails to file a return within thirty days of the due date thereof, even if no tax is due. W. Va. Code § 11-14C-40(c) imposes a civil penalty on any person required to file a return, who fails to file said return within thirty days of the due date thereof. W. Va. Code § 11-14C-41(a) makes willful commission of certain acts misdemeanors and imposes criminal penalties therefor. W. Va. Code § 11-14C-41(b) makes willful commission of certain acts with intent to evade the motor fuel excise tax felonies and imposes criminal penalties therefor.

These provisions of the motor fuel excise tax statute create multiple standards for imposition of penalties, both civil and criminal. Sections 11-14C-34(f), 11-14C-35(b), 11-14C-36(a)(1), (3), (4) & (5), 11-14C-37(a), 11-14C-40(b) & (c) require mere performance of the predicate act, with no consideration of the actor's mental state in doing so. Section 11-14C-36(a)(2) requires the predicate act to have been performed willfully, while §§ 11-14C-41(a) & (b) require the predicate act to have been performed willfully in order to trigger criminal penalties. Section 11-14C-39(a) requires the predicate act to have been performed intentionally. Section 11-14C-40(a) requires the predicate act to have been false or fraudulent. Section 11-14C-38 has the same standard as §§ 11-14C-34(f), 11-14C-35(b), 11-14C-36(a)(1), (3), (4) & (5), 11-14C-37(a), 11-14C-40(b) & (c). Mere performance of the predicate act triggers the civil penalty.

Clearly, the Legislature established the same standard for § 11-14C-38 as for §§ 11-14C-34(f), 11-14C-35(b), 11-14C-36(a)(1), (3), (4) & (5), 11-14C-37(a), and 11-14C-40(b) & (c). As evidenced by its imposition of higher standards in other sections of the same enactment, it was aware of its authority to do so. It could have established a higher threshold for the predicate act in § 11-14C-38 as a condition precedent for application of the penalty. By not doing so, it clearly intended the lower threshold. In this respect the statute is clear and unambiguous. This Office is bound to apply the legislative intent, as disclosed by the plain language of the statute.⁵

West Virginia Code §§ 11-10-18 & 11-10-19 both articulate predicate acts requiring some degree of conscious action on the part of the taxpayer. On the other hand, under W. Va. Code § 11-14C-38 the predicate or triggering event is engaging in business without first having obtained or subsequently having retained a license, regardless of the taxpayer's state of mind. Insofar as § 11-14C-38 imposes a civil penalty, as opposed to additions to tax, it is in conflict

with § 11-10-18. Insofar as it does not require knowledge, willfulness, negligence, intentional disregard, fraud or falsehood, it is in conflict with both §§ 11-10-18 & 19. Insofar as the statutes require different predicate acts, they are in conflict. The Petitioner seems to contend that because these conflicts exist, § 11-14C-38 must be read *in pari materia* with the Tax Procedures and Administration Act. However, W. Va. Code § 11-14C-33(c) provides otherwise. Where some provision of Chapter 11, Article 10 conflicts with some provision of Chapter 11, Article 14C, the provisions of Article 14C control. Consequently, the provisions of § 11-14C-38, which are clear, unambiguous and stated in plain language, must be applied.

The absence of any language respecting the state of mind of the taxpayer in establishing the predicate act for triggering the civil penalty evinces legislative intent that § 11-14C-38 be strictly enforced. Once the State Tax Commissioner determines that the taxpayer is subject to the civil penalty, this Office's authority is limited to determining whether or not the taxpayer engaged in the predicate act. Where other standards are required by statute, such as intent, negligence or falsehood or fraud, this Office may have to determine whether such predicate is satisfied. However, where a higher standard is not required by statute, this Office may not impose one. This Office has no inherent or plenary authority to waive or abate the civil penalty.

The Petitioner maintains that there is some doubt or ambiguity in the language of W. Va. Code § 11-14C-38 which requires that section to be read *in pari materia* with §§ 11-10-18 & 19. The doctrine of *in pari materia* may be used only when there is some doubt or ambiguity in the wording of the statute that is under consideration. *See, e.g., Hudok v. Bd. of Ed. of Randolph Co.* 187 W. Va. 93, 96, n. 5, 415 S.E.2d 897, 900, n. 5 (1992); *Kimes v. Bechtold*, 176 W. Va. 182, 184-85, 342 S.E.2d 147, 150-51 (1986); Syl. Pt. 4, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984); Syl. Pt. 2, *State v. Jackson*, 145 W. Va. 51, 112 S.E.2d 452 (1960); and Syl.

⁵ The absence of a higher standard should not be read to imply that one must look elsewhere for a higher

Pt. 1, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). Thus, this Office would be required to find some doubt or ambiguity respecting the wording of W. Va. Code § 11-14C-38. As set forth above, no doubt or ambiguity exists in the language of the statute. Consequently, the *in pari materia* doctrine does not apply.

Assuming, *arguendo*, that this Office agreed with the Petitioner that W. Va. Code § 11-14C-38 is ambiguous and must be read *in pari materia* with other provisions of the Code, it could not be read *in pari materia* with §§ 11-10-18 & 19. “Statutes which relate to the same subject matter should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” *Kimes*, at 184, 342 S.E.2d at 150; *Manchin*, at 535, 327 S.E.2d at 713. *See also* 2B Singer, *Statutes and Statutory Construction* § 51.03 (West 6th ed. 2000 rev). The rule is most applicable to statutes relating to the same subject matter which are passed at the same time and refer to each other or amend each other. *Kimes*, at 185, 342 S.E.2d at 150-51; *Manchin*, at 535, 327 S.E.2d at 714. The cited sections of Article 14C all relate to the same tax; they all impose civil penalties for violations of the act; and they were all enacted at one time. Clearly, if the doctrine of *in pari materia* were to apply, and it does not, it would require that W. Va. Code § 11-14C-38 be read *in pari materia* with the remaining provisions of the motor fuel excise tax statute.

Section 11-14C-38 is consistent with the overarching scheme of the motor fuel excise tax statute. This statutory scheme is designed to ensure that every drop of motor fuel is accounted for; that tax is paid on that which is subject to taxation; and that nontaxable fuel is not used for taxable purposes. The statutory scheme provides civil penalties that may seem steep or harsh. In many instances, the civil penalties are imposed for unintentional or unknowing violations. This

standard. Instead, it means that the Legislature intended the lesser standard to apply.

statutory scheme thus evinces legislative intent to ensure that those engaging in business subject to Article 14C learn the law, know it, and strictly comply with it, or incur a civil penalty.

The statutory scheme also evinces a legislative intent that the State Tax Commissioner's imposition of the penalty not be subject to plenary review by a reviewing tribunal, such as this Office. If a taxpayer violates a statutory requirement, it is subject to a civil penalty. The Tax Commissioner is not required to impose the penalty. However, once he does so, this Office may not second guess his decision. Only if the taxpayer proves that it did not actually engage in the predicate act may a civil penalty assessment be abated. Here, the evidence shows that the Petitioner engaged in the predicate act. Therefore, this Office may not abate the civil penalty assessment.

The Petitioner also contends that considerations of procedural due process require abatement of the assessment. It maintains that it did not receive fair notice that its conduct would subject it to the civil penalties that were ultimately assessed. It argues that the willfulness standard should apply, because demonstrating willfulness would clearly show that it was aware of the potential consequences of its actions. This argument is without merit.⁶

In support of its procedural due process argument the Petitioner cites cases in which the courts were required to address the issue of whether or not punitive damage jury awards were excessive. *See BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); and *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997). In each of these cases, the issue was whether the defendants, against who juries entered substantial punitive damages awards, received notice of potential punitive damage awards adequate to afford them

⁶ Unlike the response to the Petitioner's argument that the standards for assessment of additions to tax and penalties under the Tax Procedures Act should apply to W. Va. Code § 11-14C-38, counsel for the State Tax Commissioner simply fails to respond to this argument. This Office is left to assume that the Tax Commissioner would respond based on what seem to be apparent flaws in the Petitioner's argument, which should have been addressed by counsel for the State Tax Commissioner.

due process of law. In *BMW of North America*, the compensatory damages award was \$4,000, while the punitive damages award was \$4,000,000, or 1000 times the compensatory damages award. In *Sheetz*, the compensatory damages award was \$300,066, while the punitive damages award was \$2,699,000, or 9 times the compensatory damages award. In each instance, the reviewing court reduced the punitive damages award.

The present matter does not present an issue similar to that decided by the courts in *BMW of North America* and *Sheetz*. In those actions, there was no definite, express amount that could be awarded as punitive damages. Absent some judicially imposed limit, there was no limitation on the amount that a jury could award. The defendants in those cases apparently had no expectation that the punitive damage awards would be so punitive.

In the present matter those considerations are not present. The Petitioner could have made itself aware of the necessity of obtaining the license required by W. Va. Code § 11-14C-38. The statute expressly sets out a definite civil penalty for a first violation and for all subsequent violations. Employees of the State Tax Commissioner or professional tax practitioners could have advised the Petitioner of the potential civil penalties, including the penalties for multiple statutory violations. A taxpayer could learn on its own.⁷ The Petitioner was not prevented from learning the consequences of a statutory violation. The procedural due process considerations addressed in *BMW of North America* and *Sheetz* are not present in this matter. There is no procedural due process violation in this respect.⁸

The Petitioner's reliance on *Tony P. Sellitti Construction Co. v. Caryl*, 185 W. Va. 584, 408 S.E.2d 336 (1991), is also misplaced. *Sellitti* involved an assessment of additions to tax

⁷ Admittedly, this might not be the easiest task for laypersons who are not versed in the intricacies of the West Virginia tax code. However, this does not mean that this is impossible, or even unlikely.

⁸ Even if this Office found the same due process considerations to be present in this action, as an executive agency it could not declare the statute unconstitutional.

under W. Va. Code § 11-10-18, which were waived by the circuit court. The Supreme Court affirmed the waiver, holding that a failure to file returns or pay tax based on a good faith challenge to the statute constitutes reasonable cause and is not due to willful neglect, satisfying the standard established by § 11-10-18. As already noted, the standard created under § 11-10-18 does not apply here. Therefore, *Sellitti* is not binding. Because the Petitioner violated the applicable statutory standard, the civil penalties must be upheld.

The Petitioner also argues that the civil penalties assessed herein shock the conscience and are so harsh as to violate both the state and federal constitutions. It maintains that had it been notified after the first violation, it could have complied with the statute, thereby avoiding the second and third violations.⁹ It argues that issuance of a single assessment imposing three separate civil penalties for three separate violations of W. Va. Code § 11-14C-38 violates the legislative intent of deterring repeated violations of the statute. It reasons that issuance of a first assessment is designed to deter future violations of the statute. A first assessment including civil penalties for multiple violations deprives a violator of an opportunity to correct its behavior. The Petitioner is correct insofar as it argues that under such circumstances it has had no opportunity to correct its mistakes. However, this consideration is not paramount.

This Office has previously addressed this contention. In the prior matter, State Tax Department personnel stopped two of the taxpayer's trucks at the same location within minutes of each other. They cited the taxpayer for two violations of the same statute, with the second violation bearing an increased penalty. In affirming the assessment, this Office stated:

The Petitioner expresses concern with the fact that it received two assessments within ten to fifteen minutes for the same statutory violation. It complains that it believed it was complying with the statute. When it received its first assessment,

⁹ It also points out that because it had no responsibility to pay the tax, the State was not deprived of any tax revenue by reason of its failure to comply with the statute. However, tracking the flow of fuel is an important function of the statutory scheme. Hence, this function is a reason for imposing penalties on violators who owe no tax.

in effect putting it on notice that it was not complying with the statute, it did not have the opportunity to take steps to correct its deficiencies before being issued a second assessment.

This Office is not unmindful of the Petitioner's concern. However, the Petitioner has committed two separate violations of the statute. The Tax Commissioner has chosen to enforce the strict letter of the law. Stated differently, the Tax Commissioner has chosen not to exercise any discretion to give the Petitioner an opportunity to take corrective activity before issuing a second assessment. [Footnote omitted.] The statute in this matter gives this Office no authority to waive, abate or reduce the civil penalty. Since the Tax Commissioner has chosen to enforce the strict letter of the law, and since a statutory violation has been proven, this Office must affirm the civil penalty.

See WVOTA Decision 05-648 MFE, pp. 13-14 (September 26, 2006).

Under the Petitioner's theory, one who violates the statute once would be encouraged to commit multiple violations in as short a time as possible thereafter. It argues that once it commits a violation it must be given notice of the violation and an opportunity to correct its behavior before a second assessment can be issued. In effect, this gives it *carte blanche* to commit unlimited violations between the violation and issuance of an assessment for the first violation. Only after being assessed would the taxpayer be on "notice" that it was required to comply with the statute.¹⁰ This construct hardly constitutes a model of sensible tax enforcement. To the contrary, it would be an invitation to flaunt the law. As per the decision in WVOTA Decision 05-648 MFE and for the reasons stated, this argument is without merit.

The Petitioner clearly thinks the civil penalty assessed is excessive, given the nature of the violations and its evident lack of intent to violate the statute. It seems to argue that there should be some measure of forbearance in the amount assessed. This Office tends to agree. The Petitioner seems to have wanted to comply with the statute. It did not move with great dispatch and apparently ran into problems, some of its own making, some caused by others. Regardless of these considerations, however, the relief requested is not within the authority of this Office.

¹⁰ The statute should be notice enough.

The Legislature has vested the State Tax Commissioner with the discretion to assess a civil penalty. The Petitioner violated the statute and was assessed by the Tax Commissioner. This Office may not abate the assessment.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment respecting a civil penalty assessment issued pursuant to W. Va. Code § 11-14C-1, *et seq.*, the burden of proof is upon the Petitioner to show that the civil penalty assessment against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. West Virginia Code § 11-14C-38 [2003] makes any person who engages in any business activity for which a license is required by Article 14C, without having first obtained and subsequently retained such a valid license, subject to a civil penalty in the amount of \$5,000.00 for a first violation, and \$10,000.00 for the second and all subsequent violations.

3. The language of W. Va. Code § 11-14C-38 [2003] is clear and unambiguous, and does not require willfulness, or any other evidence respecting a person's mental state, as a predicate for imposition of the civil penalty provided by that section.

4. West Virginia Code § 11-14C-33(a) & -(b) [2003] provide that each and every provision of Chapter 11, Articles 9 & 10 applies to the taxes levied by Article 14C, except as otherwise expressly provided in Article 14C, with like effect as if Articles 9 & 10 were applicable only to the taxes levied by Article 14C and were set forth *in extenso* in said article.

5. West Virginia Code § 11-14C-33(c) [2003] provides that where there is some conflict between any provision of Article 14C and any provision of Article 10, the provision of Article 14C shall control.

6. In reviewing a civil penalty assessment issued by the State Tax Commissioner pursuant to the provisions of W. Va. Code § 11-14C-38 [2003], the West Virginia Office of Tax Appeals is limited to determining whether or not the taxpayer engaged in the predicate act that gives rise to the civil penalty, and may abate an assessment issued by the State Tax Commissioner only when it is proven that the taxpayer did not engage in the predicate act authorizing imposition of the civil penalty giving rise to the assessment.

7. The language of W. Va. Code § 11-14C-38 [2003], being without doubt or ambiguity, is not to be “construed” *in pari materia* with the provisions of Chapter 11, Article 10 of the Code.

8. The overarching scheme of Chapter 11, Article 14C, permits the State Tax Commissioner to issue a civil penalty assessment for violations of the applicable statutory provisions set forth therein.

9. A person who violates W. Va. Code § 11-14C-38 [2003] may be assessed a civil penalty for the violation, even when the violation is without knowledge of the statute or intent to violate the same.

10. W. Va. Code § 11-14C-38 [2003] does not violate the Petitioner’s right to due process, because the amount of the penalty set forth therein neither works a forfeiture nor shocks the conscience.

11. A person subject to W. Va. Code, Chapter 11, Article 14C, may be assessed multiple civil penalties for multiple statutory violations even though it is not given notice of the statutory violation by means of an assessment issued after the first violation.

12. The Petitioner in this matter has failed to carry its burden of proving that the civil penalty assessment against it is erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the motor fuel excise tax civil penalty assessment issued against the Petitioner for three violations occurring in October, November and December of 2005, in the amount of \$_____, should be and is hereby **AFFIRMED**.